No. 82-973

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

ANN L. RITTER

420 Madison Avenue
Suite 1200
New York, New York 10017
(212) 371-4050

Attorney for Respondent

QUESTION PRESENTED

Whether the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 et seq., changed the standard an alien must meet in order to avoid deportation on the ground that he would be subject to political persecution in the country of deportation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous:

Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979) 16 25,41,42,43

Weis. The Development of Refugee Law, Transnational Legal Problems of Refugees; Michigan Yearbook of International Legal Studies, Clark Boardman Company, Ltd. (1982) 26

Congressional Record, May 4, 1983, S 6035 39

III Cong. Rec. 21, 755; 21,268-269 (1965) 40

New York Times, Feb.26, 1983 46

New York Times, April 5, 1983 46

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1982

No. 82-973

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner

v.

PREGRAG STEVIC,

Respondent

WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

STATUTE INVOLVED

8 U.S.C. (Supp.V) 1253 (h) (1) provides in pertinent part:

> "The Attorney General shall not deport or return any alien *** to a country if the Attorney General determines that such an alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

STATEMENT

Predrag Stevic was born on June 11, 1950, in Gnjilane, Kosovo, Yugoslavia, a section of Yugoslavia that is 92% occupied by ethnic Albanians who are trying by terroristic tactics to evict the remaining Yugoslavs so that this province may secede from Yugoslavia and become part of Albania. The Yugoslav Government has been unable to control the Albanian violence.

Mr Stevic, a university philosophy graduate, entered the United States on June

8, 1976 to visit his sister in Chicago, Vidosava Stevic Lazarevic, now a United States Citizen. He overstayed his visit and was placed under deportation proceedings in November, 1976. On December 16, 1976, Mr Stevic appeared at a deportation hearing before an immigration judge. He did not contest his deportability, nor did he apply for political asylum or withholding of deportation, but instead he agreed to two months' "voluntary departure".

On January 16, 1977, Mr.Stevic married Mirjana Doychin, a United States citizen, who filed an immediate relative petition for him. At that time, Mirjana's father, Pavela Doychin, also a U.S. citizen, was in prison in Yugoslavia because of his anti-communist activities. Believing his U.S. citizenship would protect him, Mr Doychin, who was active in the Serbian anti-communist movement in

Chicago, had returned to Yugoslavia for a visit in 1974. He remained in prison there for three years and upon his return to the United States, committed suicide.

On January 28, 1977, Mr Stevic applied for membership in the League of Serbian Volunteers. On February 5, 1977, he was inducted, vowing to fight against communism until the entire Serbian population was liberated.(R. 165-169.)*

On April 10, 1977, Mrs Stevic was killed in an automobile accident.

The immediate relative petition was revoked by the Immigration and Naturalization Service on June 13, 1977 and a request to reinstate the petition for humanitarian reasons under newly enacted 8 CFR 205.1

(*) "R" refers to the certified administrative record in the Court of Appeals.

(a)(3) was summarily denied.(1)

On August 24, 1977, Mr Stevic's Chicago attorney made a Motion to reopen deportation proceedings to allow Mr Stevic to apply for withholding of deportation under Section 243 (h) of the Immigration and Nationlity Act.(2)

Section 243 (h) at that time, read:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race,

(1) §205.1 Automatic revocation
The approval of a petition ...is revoked as of the date of approval...if any of the following circumstances occur...
(a)(3) Upon the death of the petitioner unless the Attorney General in his discretion determines that for humanitarian reasons revocation would be inappropriate.
(2) The Immigration and Nationality Act of October 3, 1965 (79 Stat. 918) substituted "persecution on account of race, religion or political opinion" for "physical persecution".

> religion, or political opinion and for such period of time as he deems necessary for such reason."

Since his marriage to Mira and because of his father-in-law's imprisonment in Yugoslavia, Mr Stevic had become active in the "overseas" anti-communist movement.

In June, 1979, Mr Stevic also independently applied for political asylum to the District Director in Chicago, which application was denied on July 31, 1979. (R.164.)

On October 17, 1979, the first Motion to reopen was denied by an Immigration judge, whose decision stated:

> "The policy of restricting favorable exercise of discretion to cases of clear probability of persecution of the particular individual has been sanctioned by the courts (Lena v. Immigration and Naturalization Service. 379 F 2nd

> 536 538 (7th Cir. 1967). The respondent has submitted no substantial evidence that he would be subjected to persecution as that term is defined by the court. (R.151).

An Appeal to the Board of Immigration Appeals was filed on October 26, 1979.

On January 18, 1980, the Board of Immigration Appeals, in dismissing the Appeal for lack of prima facie eligibility and denying the Motion to reopen, stated:

> "A Motion to reopen based on a Section 243 (h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. See Cheng Kai Fu v. INS, 386 F. 2d 750 (2 Cir. 1967) cert denied 390 U.S. 1003 (1968).
>
> Although the applicant here claims to be eligible for withholding of deportation which was not available to him at the time of his deportation hearing, he has not presented any evidence which would indicate that he will be singled out for persecution." (R.143)

Mr Stevic's membership in the Ravna Gora, his father-in-law's imprisonment in

Yugoslavia, proof of imprisonment of others who expressed anti-communist opinions outside of Yugoslavia, were discounted as not "objective evidence" under the "clear probability of persecution" test.

On March 17, 1980, the Refugee Act of 1980, Public Law 96-212, 94 Stat. 102 et seq. was signed into law.

On July 17, 1981, Mr Stevic, who had been ordered to surrender for deportation in February 1981, was arrested in Chicago for deportation.

While changing planes in New York, he broke away from his guards and after an altercation at Kennedy Airport, was placed in an immigration detention center in New York City.

A Writ of Habeas Corpus brought in the U.S. District Court, Southern District of New York on July 21, 1981, addressed solely to the abuse of discretion by the INS in the

denial of humanitarian relief when Mr Stevic's wife was killed, was dismissed.

Simultaneously, a new Motion was made to the Board of Immigration Appeals for reopening of deportation proceedings to allow Mr Stevic to apply for withholding of deportation under Section 243 (h) of the Immigration and Nationality Act. Voluminous, evidentiary materials were presented to establish Mr Stevic's prima facie eligibility for withholding of deportation under section 243 (h) of the Immigration and Nationality Act and his eligibility for reopening under 8 C.F.R. 3.2, which states:

> "Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien

> an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefore was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing."

The Motion was denied on September 3,1981. The denial, in summary, held that Mr Stevic had failed to establish a "clear probability of persecution" to be directed at him if he were to return to Yugoslavia.

The Board stated:

> "...We also conclude that the respondent has failed to make out a prima facie showing that he will be singled out for persecution if deported to Yugoslavia. A Motion to reopen, based on a Section 243 (h) claim of persecution, must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. See Cheng Kai Fu v. INS, 386 F 2d 750 (2 Cir. 1967) cert denied 390 U.S. 1003 (1968); Matter of McMullen, Interim Decision 2831 (BIA 1981)..."

> The affidavits and petitions contained in the file, while they conclude that the respondent will be imprisoned if he returns to Yugoslavia, do not contain any supporting facts. They express an opinion but provide no direct evidence to link the respondents activities in this country and the probability of his persecution in Yugoslavia.(R.3.)

Although Mr Stevic had submitted affidavits from prominent members of the anti-communist Yugoslavian community expressing the opinion that he would be imprisoned if he returned to Yugoslavia because of Yugoslavia's "hostile propaganda"(3)

(3) Article 133 of the Yugoslavian Federal Criminal Code states:

> "1) Whoever, by means of an article, leaflet, drawing, speech or some other way, advocates or incites the overthrow of the rule of the working class and the working people...shall be punished by imprisonment for from one to ten years.
>
> 2) Whoever commits an offense as mentioned in paragraph (1) of this article with aid or under influence from abroad, shall be punished by imprisonment for at least one year."

laws, proof of his membership in the leading anti-communist Yugoslavian organizations in Chicago, reports from Amnesty International not previously available regarding Yugoslavia's "hostile propaganda laws" under which a person may be imprisoned in Yugoslavia for an expression of anti-communist opinions outside of Yugoslavia, and newspaper and magazine articles concerning Albanian terrorist activities in Kosovo, which the Yugoslavian government was unable to control, the Board of Immigration Appeals felt he had provided no "direct evidence" to link his activities in this country to the probability of his persecution in Yugoslavia. Yet, Mr Stevic's father-in-law had been imprisoned under the "hostile propoganda" laws.

Mr Stevic had clearly established a "well founded fear of persecution," the

standard under the U.N.Convention and Protocol, which we had incorporated in the Refugee Act of 1980. He might not have established a "clear probability of persecution" as he could not produce a bullet with his name on it, or a Yugoslavian police look-out list. But neither can most legitimate refugees.

In a consolidated proceeding, the District Court's denial was appealed and review was sought for the BIA denial of the Motion to reopen deportation proceedings in the Second Circuit Court of Appeals. Argument, on January 18, 1982, centered primarily upon whether the Refugee act of 1980 had changed the legal standard for aliens seeking political asylum and to avoid deportation under Section 243 (h) of the Immigration and Nationality Act.

Although the Court of Appeals upheld the

District Court's denial of the Petition for Habeas Corpus, it reversed the BIA denial of the Motion to Reopen, holding that the enactment of the Refugee Act of 1980, Public Law No. 96-212, 94 Stat. 102 et seq. had changed the standards to be used by the INS in adjudicating requests for withholding of deportation under Section 243 (h) of the Immigration and Nationality Act.

The Court held that with the passage of the Refugee Act of 1980, the non-discretionary standard to be applied for withholding of deportation under Section 243 (h) was now "a well-founded fear of persecution", the language not only contained in the Refugee Act, but also the standard of the United Nations Protocol relating to the Status of Refugees, to which the United States had adhered in 1968.

It found that the legal test used by the

BIA in denying Mr Stevic's second Motion, "clear probability", that an individual would be singled out for persecution, was no longer the law.

A new hearing under the legal standard established by the U.N.Protocol and adopted by the United States through the Passage in March 1980 of the Refugee Act of 1980, was ordered.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue before the Court is whether the Refugee Act of 1980 changed the standard an alien must meet in order to avoid deportation on the-ground that he would be subject to political persecution in the country of deportation.

The Government contends that the standard before 1980 was and is the same as the standard subsequent to the passage of this Law. We contend that it was and is not.

The United States and Swaziland were the only two of the 71 nations who became parties to the United Nation 1967 Protocol Relating to the Status of Refugees by 1979 who had not been parties to the 1951 Convention.(4)

Yet the United States has historically been considered in the forefront of the community of nations in its compassion for refugees. The problem has not been a lack of humanitarian concern for refugees but rather a lack of commitment to a formal refugee policy. We have had, instead, a policy of improvisation based upon reaction to emergent world crises.

While ambiguity may be the language of diplomacy by necessity, the law requires

(4) Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. Published by the Office of the United Nations High Commissioner for Refugees, Geneva, Sept. 1979, p. 86.

greater precision. It is for this reason that this case is before this tribunal. The rhetoric of diplomacy has been confused with the language of law in an area in which both are important but have different functions.

The Government contends that the terms "clear probability or persecution" and "well founded fear of persecution" mean and were meant to be the same, and differ only in their spelling. We contend that subsequent to the passage of the Refugee Act of 1980, the standard changed by statute to the latter, and that some attention must finally be paid to the clear meaning of the Statute's wording so that our courts and administrative agencies may finally have some clear guidelines.

The Government contended in its Petition for Certiorari that to find that the standard for determining who is a refugee changed in

1980 would cause thousands of persons whose cases had been decided since 1980 to reopen their cases. This is unrealistic, since many applicants for withholding of deportation would meet neither criteria. It is for those who do not meet the "clear probability criteria, who do not have a bullet reserved in their names, but who do indeed meet the "well founded fear" criteria, that any administrative inconvenience is justified.

Moreover, the Government's strained reasoning that "well founded fear" and "clear probability of persecution" mean the same thing is founded upon the Board's desire, a decade ago, to show that we were observing the U.N. Protocol, although no legislation in its honor had been passed and our administrative agencies were ignoring it.

With the passage of the Refugee Act of 1980 the U.N. standard has become domestic

law and it is time to lay this convoluted reasoning to rest.

ARGUMENT

THE REFUGEE ACT OF 1980 CHANGED THE STANDARD AN ALIEN MUST MEET IN ORDER TO AVOID DEPORTATION ON THE GROUND THAT HE WOULD BE SUBJECT TO PERSECUTION IN THE COUNTRY OF DEPORTATION.

A. After Acceding To The United Nations Protocol Relating To The Status of Refugees in 1968, The United States Failed To Adopt The Protocol Definition Of Refugee By Either Legislative Act Or Administrative Regulation. To Explain This Seeming Failure To Honor Our Treaty Obligations The Board And The Courts Resorted To The Sophist Reasoning That Since The Protocol Was A Self-Executing Treaty, No Legislation Was Necessary, Consequently Compelling Them To State That Since The "Well Founded Fear" Standard Was Therefore The Law Of The Land, It Was Perforce Equivalent To The Pre-Protocol Standard Of "Clear Probability Of Persecution", Which Had Not Changed.

This reasoning was the genesis of the problem today. In fact, the Protocol was not a Self-Executing Treaty, and required enacting legislation. The enacting legislation was passed in 1980. With the passage of the Refugee Act of 1980, the standards for determining who is a refugee

were changed by statute to require a showing of a "Well Founded Fear of Persecution."

In 1968, the United States acceded to the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223,T.I.A.S.No.6577 which incorporated the definition of refugee of the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, except for geographic modifications.

Under Article 1 of the Protocol, a "refugee" is defined as any person who:

> "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country..."

If a person met the definition of "refugee" under the Protocol, he was not to be returned to his country, unless he was a

threat to national security or a war criminal. (Principle of Non-Refoulement: Article 33, Convention Relating to Refugees).

At the time the Protocol was acceded to by the United States, there was no definition of "refugee" in the Immigration and Nationality Act. In fact there never had been. Withholding of deportation because of persecution was achieved under Section 243 (h) of the Immigration and Nationality Act, 8 U.S.C. 1253 (h) which held:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

Decisions, made in the discretion of the Attorney General invariably held that a motion to reopen based upon a Section 243 (h) claim of persecution must contain <u>prima facie</u>

evidence that there is a

> "clear probability of persecution of the particular individual alien" Lena v. INS 379 F 2d 536 (7 Cir 1967) Cheng Kai Fu v INS 386 F 2d 750 (2 Cir 1967)

With accession to the Protocol in November 1968, there was no change in the standard used by the courts or by the Board of Immigration Appeals. Fleurinor v. INS 585 F 2d 129 (5th Cir. 1978); Kashani v. INS 547 F 2d 376; (7th Cir. 1977) In re Williams 16 I & N Dec. 697 (1979) In re Dunar, 14 I & N Dec. 310 (1973).

The extremely harsh, judicially developed clear probability standard continued to be applied after the accession. Our treaty obligations were ignored.

Under Article VI of the U.S. Constitution, international treaties entered into by the United States are the supreme law of the land. Missouri v. Holland 252 U.S. 416

(1920). Self-executing treaties require no legislative implementation, and supersede any prior inconsistent law. Cook v. United States 288 U.S. 102, 118 (1933). Non self-executing treaties require legislative action.

The Court in United States v. Postal 589 F 2d 862, 876 described the problem of determining whether a treaty was self-executing or not "perhaps one of the most confounding in treaty law."

Treaties have been held to be self executing when their terms clearly convey such an intention and when detailed standards are provided for executive-administrative application. When treaties impose obligations intended to be discharged through legislative action they are considered non self-executing. Cook v. U.S. 288 U.S. 102, 119 (1933). When the terms of a treaty import a contract, and the parties to the treaty

promise to perform a particular act, and then legislation is necessary before it can be considered binding upon the courts. Foster v. Neilson 27 U.S. 253, 314.

If we look to the language of the Convention and Protocol, we find, first, that the parties are referred to as "contracting" states in conformity with Chief Justice Marshall's definition. But, more important, we find that the language of the Protocol indicates that legislation is expected, to carry out the terms of the contract. The Protocol states:

> Article III
> Information on National Legislation
>
> The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol. (Emphasis supplied).

It would therefore appear that the

Protocol intended and required domestic legislation by the contracting states to ensure the application of its terms, and that it was not a self-executing treaty.

The fact that legislation domestically was necessary to determine refugee status was recognized by the Office of the United Nations High Commissioner for Refugees (5):

> "189...the 1951 Convention and the 1967 Protocol define who is a refugee for the purposes of these instruments. It is obvious that, to enable States Parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified. Such identification, i.e. the determination of refugee status, although mentioned in

---

(5) Office of the United Nations High Commissioner ofor Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees Geneva, September 1979, Page 45.

> the 1951 Convention...is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure."

Paul Weis, former Director of the Legal Division of the Office of the United Nations High Commissioner for Refugees, similarly recognized the lack of the binding effect of the definition of "refugee" in the Convention and Protocol(6):

> "The description of international and national legislation shows the importance of refugee character, as the applicability of this legislation depends on the fact that the person meets the definition of refugee in the

(6) Weis. The Development of Refugee Law Transnational Legal Problems of Refugees; Michigan Yearbook of International Legal Studies, Clark Boardman Company,Ltd. (1982)

> relevant instrument, normally the 1951 Convention, as amended by the 1967 Protocol. Moreoever, a considerable number of countries party to the Convention and Protocol have adopted this definition as the criterion for the granting of asylum, although no such obligation exists under these instruments.

In 1980 the required legislation was passed, which incorporated the Protocol definition of "refugee" into the Immigration and Nationality Act. However, during the twelve years between 1968 and 1980, although we had pledged to conform our domestic legislation to our obligation under the Protocol, we had, in fact, made no changes at all, either administratively or legislatively. Recognition of the Protocol hinged upon incorporating the Protocol definition of "refugee" into domestic law, but we did nothing.

If we had considered the treaty to be

self-executing, then with accession alone, we should have begun to use the Protocol definition of "refugee", a person who has a "well-founed fear of persecution" instead of continuing to use "the clear probability of persecution" standard. In fact, the treaty was regarded domestically as a political act, and non-self-executing. But why was domestic legislation not passed?

This problem was clearly focused in In re Dunar, 14 I & N Dec. 310 (1973), when a Hungarian refugee who had lived in the non-communist world for the previous fifteen years and had escaped from Hungary during the uprising of 1956, requesting withholding of deportation, "non-refoulement" under the standards of the Convention and Protocol.

The Board of Immigration Appeals, as there was no enacting legislation, which should normally have followed a non

self-executing treaty, proclaimed that the Protocol, which incorporated the standards of the Convention, was a self-executing treaty. Then, noting that a self-executing treaty supersedes a prior Congressional enactment, if the two are inconsistent (Cook v.United States, 288 U.S. 102,118), but that if both relate to the same subject, attempt should be made to give effect to both (Whitney v. Robinson, 124 U.S. 190,194), the board proceeded to state that "well-founded fear" and "clear probability of persecution" were equivalent. By this reasoning, based upon an erroneous first premise, that the Protocol was self-executing, the Board was able to accomplish the following: (1) to justify why Congress had not passed any enacting legislation although we adhered to the Protocol six years previously; (2) to establish that the United States took its

treaty commitments seriously, and was not violating any treaty obligations; (3) to maintain the image of the United States foreign policy interests through reaffirming our commitment to the Protocol.

Mr Dunar's case was not one of speculation supported by no objective evidence. In fact, he may well have established a prima facie case for "well-founded fear of persecution"; but the "clear probability" standard is impossible for most persons to meet.

It is impossible to speculate at this time, but perhaps if the Board had decided differently, the Refugee Act of 1980 might have been the Refugee Act of 1974.

B. Until The Refugee Act Of 1980, The United States Lacked A Commitment To A Formal Refugee Policy And Individual Laws Were Passed In Response To Emergent World Crises. With The Passage Of The Refugee Act Of 1980, Formal Standards For Determining Refugee Status Were Promulgated For The First Time, Which Standards Were To Be Used For Determining Eligibility For Withholding Of Deportation For Feared Political Persecution.

This country was, to a large extent, originally settled by refugees from European political oppression, who came to the New World to seek a new life. But there was no necessity, until this century, for a formal refugee policy as they came with the normal flow of immigrants, and provided the labor on one hand, and the intellectual passion for freedom, on the other, that built this nation.

The problem has arisen with the maturity of the nation, as we now wish to protect our citizenry from economic competition, a valid concern. Thus our fear, apparent at every turn, of opening up the proverbial "floodgates" has clouded our reason.

Prior to the Refugee Act of 1980, a definition of "refugee" was absent from the Immigration and Nationality Acts, and the administrative Code of Federal Regulations

relating to Aliens (8 CFR) contained no standard whatsoever for determining refugee status.

The determination of who was to be eligible for the Attorney General's discretionary withholding of deportation, was made in the discretion of the Attorney General.

Section 243 (h) of the Immigration and Nationality Act of 1952, as amended by the Act of October 3, 1965 (79 Stat 918) stated:

> (h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion..."

While it was stated that if an alien met the standard asserted by the Attorney General for withholding of deportation, his

discretion was always exercised, nevertheless the standard was extremely harsh. A rule of "clear probability of persecution of the particular individual" was adopted, and crystallized in the decisions of Lena v. INS 379 F. 2d 536, 538, and Cheng Kai Fu v. INS 386 F. 2d 750 (2nd Cir. 1967) cert denied 390 U.S. 1003 (1968).

The clear probability rule required strong objective evidence in its support, such as a history of previous political incarceration. It discounted any form of subjective fear, unless supported by the aforesaid kind of "objective evidence", which was usually impossible to obtain.

As an example, in Matter of Tan, 12 I & N Dec. 564 (BIA 1967) withholding of deportation was denied for failure to show a "clear probability of persecution" of a Chinese alien who documented a "well-founded

fear of persecution in Indonesia", where, as an ethnic minority, the Chinese were persecuted and her father's bakery had been the subject of mob violence.

In Matter of Francois, 15 I & N Dec. 534 (BIA 1975), the Board stated that an alien whose father had been murdered by the Duvalier regime in Haiti because of his political opinion, and where other members of the family had been killed upon return to Haiti after fleeing to the Bahamas, had failed to meet his burden of proof on a section 243 (h) claim. Withholding of deportation was denied for want of a "well-founded fear of persecution", although it is clear that the "clear probability" standard of near certainty was in fact used.

While the United Nations Protocol language was referred to, the standards were not at all used in domestic judicial or

administrative decisions.

In Matter of Joseph 13 I & N Dec. 70 (1968), withholding of deportation was granted to a Haitian who had been imprisoned prior to leaving Haiti; had published an anti-regime newspaper there, and had been active in anti-Duvalier movements since leaving Haiti. The basis for granting withholding was "clear probability of persecution", but it should be noted that even with this outstanding set of facts, 243 (h) relief had been previously denied by the District Director, so stringent have the requirements been for "clear probability".

With the passage of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 et seq., a definition of "refugee" was for the first time inserted in the Immigration and Nationality Act.

This definition, Section 201 (a) (42) of the Act, designed to conform with the definition of 'refugee' of the United Nations Protocol Relating to the Status of Refugees, states:

> "The term "refugee" means (A) any person who is outside any country of such person's nationality, or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of, the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or politicial opinion..."

From no standard determining who should not be deported, a well-thought-out standard in conformity with our obligations under the United Nations Protocol, to which we had adhered twelve years previously, was adopted.

Under the Protocol, the term "refugee"

was held to mean any person who:

> "...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality, and who is unable or, owing to such fear is unwilling to avail himself of the protection of that country..."

Additionally, the Code of Federal Regulations, previously naked of any guidelines for determining who would be granted asylum or relief from deportation on political grounds, was amended, and 8 C.F.R. § 208.5, "Burden of Proof" now reads:

> "The burden is on the asylum applicant to establish that he/she is unable or unwilling to avail himself or herself of the protection of the country of such person's nationality, or, in the case of a person having no nationality, the county in which such person habitually resided, because of persecution or a well-founded fear of persecution on account of race, religion, membership in a particular social group, or political opinion."

This was the first time that there were any such regulations, except for the ad hoc opinions of the immigration judges, who, lacking a set of clear rules, relied upon a rule of xenophobia, ignoring the criteria of the U.N. Protocol, although occasionally we find if not the spirit of the Protocol, its phraseology, as in Matter of Francois(supra).

Section 243 (h) of the Act was also amended, making withholding of deportation mandatory if the alien met refugee criteria:

> "The Attorney General shall not deport or return any alien...to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

However, even with the passage of the Refugee Act, and with the passage of administrative regulations, there was still no change in the standards applied by the

Attorney General.

The petitioner would have us believe that no change was necessary because in fact the two standards were equivalent, relying upon In re Dunar, and its followers. In fact, administrative failure could be one of the reasons.

The Congressional Record of May 4, 1983, S 6035, contains a reprint of an Immigration Service report on Asylum Adjudications, introduced into the record by Senator Kennedy:

> "The question frequently asked is 'Is the current law with regard to asylum adjudications workable?' We do not know the answer because INS was never able to implement fully the asylum provisions of the 1980 Refugee Act. For this most difficult time-consuming and politically controversial work, we neither trained our officers, developed comprehensive final regulations and operating instructions or gave priority to the effort."

While it is true that an application for withholding deportation and an application for asylum are not the same, they are equivalent. An application for asylum, under current regulations is considered an application also for withholding of deportation, and the standards for both are the same: there must be a "well-founded fear of persecution".

Moreover, Section 243 (h) has always been generally regarded as the section of the Act designed to aid refugees in the United States (7)

That the service has not been able to change entrenched ways of thinking, just because there is now a law, does not mean that the standard has not changed, or that the courts should defer to decisions that are

---

(7) 111 Cong. Rec.21,755; 21,268-69 (1965).

not in accordance with the law.

C.With The Passage Of The Refugee Act Of 1980, Determination Of Eligibility For Withholding Of Deportion In The United States Must Be Made Under The U.N. Protocol Standards

In September 1979, the Office of the United Nations High Commissioner for Refugees in Geneva issued a Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.

This book codified the standards used by the office of the United Nations High Commissioner for Refugees, which had been previously available in advisory form. It states: (emphasis supplied)

> "37. The phrase 'well-founded fear of being persecuted' is the key phrase of the refugee definition. It reflects the views of its authors as to the main elements of the refugee character..."

Its analysis of the standard for

determining refugee status shows how far apart the Protocol standard is from the "clear probability" standard.

> 37."Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin."
>
> 38. "To the element of fear...is added the qualification 'well-founded'... that this frame of mind must be supported by an objective situation."
>
> 40. "An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant..."
>
> 41. "An assessment of credibility is indispensible where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership in a particular racial, religious, national, social or political group, his own interpreation of his situation, and his personal

experiences - in other words, everything that may serve to indicate the predominant motive for his application is fear..."

42. "A knowledge of conditions in the applicant's country of origin - while not a primary objective - is an important element in assessing the applicant's credibility..."

43. "These considerations need not necessarily be based on the applicant's own experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. The laws of the country of origin, and particularly the manner in which they are applied will be relevant..."

45. "It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word fear refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution..."

Consider the standards applied to Mr

Stevic. He is a university graduate in philosophy, perhaps more aware than a laborer of the political conditions in his country of origin. His father-in-law and members of the anti-communist groups in the United States in which he is active have been imprisoned because of "hostile propoganda" laws. The province in which he lived and taught, is in such a state that the churches are being burned. He has never been imprisoned in Yugoslavia, so he cannot show a "clear probability". But would anyone deny that he has a well-founded fear, based upon both subjective and objective elements.

We adopted the United Nations language in our domestic law to demonstrate our international commitment to the ideals set forth in the United Nations Convention and Protocol. Can we then ignore the meaning of that language, espscially when such great

efforts have been made by the office of the High Commissioner of Refugees to be absolutely certain that that meaning is understood.

D. What Is The Standard Used Now?

Despite the government's contention that the terms "clear probability of persecution" and "well-founded fear of persecution" are interchangeable, supported by the decision in Rejaie v INS 691 F 2d 139 and historically supported by In Re Dunar 14 I & N. Dec. 310 (BIA 1973), it appears that the United States government in practice since the Stevic case which directly followed the Refugee Act of 1980, has publicly adopted the standard of the Refugee Act of 1980 or "well founded fear of persecution".

The most notable case, well publicized in the press this year, involved a Chinese tennis player, Hu Na. In granting her political asylum of April 4, 1983, Arthur Brill, speaking for the Justice Department, stated:

> "Ha Na has been granted asylum under the Refugee Act of 1980, which provides that asylum can be granted in cases where the applicant establishes a well-founded fear of persecution, due to their race, religion, nationality, political opinion, or membership in a specific social group."

In this case, reported in the New York Times on April 5, 1983, page A-1, Ms. Hu could not have demonstrated a "clear probability of persecution", as her subjective fear of persecution was prospective in her feeling that because of her unwillingness to join the Communist Party in China, she would be politically vulnerable were she to return to China.

On February 26, 1983, the New York Times also reported the granting of political asylum to a white South African, Dominic Holzhaus, who opposed his country's system of apartheid.

In granting asylum, Paul Kuznich, a State Department spokesperson, said:

> "Asylum is granted by the United States on the grounds of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion."

Clearly, despite the debate that is taking place in this Court, the government---the Department of State and the Department of Justice---has already made its decision.

It is time for the courts to follow.

CONCLUSION

The judgment of the Second Circuit Court of Appeals should be upheld as the Refugee Act of 1980 changed the standard an alien must meet in order to avoid deportation on the ground that he would be subject to persecution in the country of deportation.

Respectfully submitted.

ANN L. RITTER

Attorney

420 Madison Avenue
Suite 1200
New York, N.Y. 10017
(212) 371-4050

August 1983